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No. 14-848

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

JAMES KULBICKI

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Maryland Court of Appeals correctly determined that defense counsel was ineffective for failing to challenge the prosecution's expert evidence based on information that was available at the time of trial.

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OPINIONS BELOW

The opinion of the Maryland Court of Appeals (Pet. App. 1a-57a) is reported at 99 A.3d 730. The opinion of the Maryland Court of Special Appeals (Pet. App. 59a-114a) is reported at 53 A.3d 361. The order and opinion of the trial court (Pet. App. 115a-167a) are unreported.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on August 27, 2014. A motion for reconsideration was denied on October 21, 2014 (Pet. App. 58a). The petition for a writ of certiorari was filed on January 16, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

In 1995, respondent was tried for first-degree murder in connection with a shooting death. At trial, the prosecution heavily relied on expert testimony from Ernest Peele, an agent with the Federal Bureau of Investigation (FBI), concerning a forensic technique known as comparative bullet-lead analysis (CBLA). Specifically, Agent Peele testified that the composition of a bullet fragment found in respondent's truck matched that of a fragment recovered from the victim's body, which was "what you'd expect if you were examining two pieces of the same bullet." Agent Peele further testified that a bullet recovered from a handgun found in respondent's home was so close in composition to the fragment from the victim that they could have been "made by the same manufacturer on or about the same time" and could even have been "in the same box" of ammunition. Based largely on Agent Peele's testimony, respondent was convicted and sentenced to life imprisonment without parole.

After his conviction was affirmed on direct review, respondent filed a petition for post-conviction relief. As is relevant here, respondent claimed that defense counsel was ineffective for failing to challenge the prosecution's CBLA evidence based on information that was available at the time of trial. The trial court denied the petition, and the Maryland Court of Special Appeals affirmed. The Maryland Court of Appeals reversed, holding that counsel should have investigated Agent Peele's prior publications and cross-examined him about one of them, a report that he cowrote casting serious doubt on the reliability of CBLA. The court's factbound application of settled legal principles does not warrant further review, and the petition for a writ of certiorari should be denied.

1. Beginning in the 1960s, the FBI used CBLA to compare bullets found at crime scenes to bullets found in the possession of suspects. The FBI used this technique when it could not match a bullet to a particular firearm, either because no firearm was recovered or because the bullet was too mutilated to analyze its markings. Because of concerns about CBLA's reliability, the FBI formally discontinued its use in 2005. See Edward J. Imwinkelried & William A. Tobin, *Comparative Bullet Lead Analysis (CBLA) Evidence: Valid Inference or Ipse Dixit?*, 28 Okla. City U.L. Rev. 43, 44 (2003) (Imwinkelried & Tobin); National Research Council, *Forensic Analysis: Weighing Bullet Lead Evidence* 1 (2004) (NRC Report); Eric Lichtblau, *FBI Abandons Disputed Test for Bullets from Crime Scenes*, N.Y. Times, Sept. 2, 2005, at A12.

CBLA consisted of three steps. First, the analyst would test the chemical compositions of the various bullet samples. Second, the analyst would compare the compositions and determine whether they were "analytically indistinguishable." Third, the analyst would draw an inference about the relationship between the bullets. If the bullets were "analytically indistinguishable," the analyst would opine that they must have come from the same molten source of lead; in some cases, the analyst would go further and suggest that bullets with matching compositions were produced on the same day by the same manufacturer and even came from the same box of ammunition. Imwinkelried & Tobin 47, 50; see NRC Report 90-94 (collecting examples of CBLA testimony).

At the third step of the analysis, CBLA analysts relied on several assumptions. Of particular importance here, they assumed that each molten source of lead had a unique chemical composition, establishing a metallurgical "fingerprint." That assumption was vital to the relia-

bility of their inferences: if different sources of lead are analytically indistinguishable, then one cannot validly conclude that bullets with the same composition must have come from the same source, much less that they were produced on the same day or came from the same box. Imwinkelried & Tobin 50, 51-52; see *United States* v. *Mikos*, Crim. No. 02-137, 2003 WL 22922197, at *1 & n.1 (N.D. Ill. Dec. 9, 2003).

2. By 1991, there were significant reasons to doubt the critical assumption that each source of lead was chemically unique.[1] That year, at an international symposium on forensic evidence, several FBI analysts, led by Agent Peele, presented a key report on CBLA. See Ernest R. Peele et al., *Comparison of Bullets Using the Elemental Composition of the Lead Component*, Proceedings of the International Symposium on the Forensic Aspects of Trace Evidence 57 (1991) (Peele Report).

In the report, Agent Peele and his colleagues analyzed bullets from four leading manufacturers. For two of the manufacturers, they found that sets of bullets were analytically indistinguishable despite being packaged seven and fifteen months apart, respectively. Those findings raised the possibility that different sources of lead would produce analytically indistinguishable bullets. Yet Agent Peele and his colleagues did nothing to investigate that possibility. To the contrary, they simply speculated that the "overlapping compositions" were due to sheer "coincidence"—or that the bullets came from the same source of lead, but were stored

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[1] Even before 1991, that assumption was questionable. For example, during a 1981 trial, an FBI analyst conceded that different sources of lead "can be very close * * * if not the same" in composition. *Jones* v. *State*, 425 N.E.2d 128, 135 (Ind. 1981) (Hunter, J., dissenting).

and loaded on cartridges on different dates. Peele Report 57, 61-62.

The Peele Report was published on June 24, 1991, and distributed to public libraries in 1994. Pet. App. 25a & n.12.

3. On January 10, 1993, Gina Nueslein was found dead in Gunpowder Falls State Park, near Baltimore, as a result of an apparent gunshot wound. The police identified respondent, a police sergeant, as a potential suspect because he and the victim had been involved in a paternity suit. Pet. App. 62a-63a, 65a, 66a.

During the ensuing investigation, the police recovered six bullets from respondent's off-duty handgun and two bullet fragments from respondent's truck. The police sent those samples, along with a fragment recovered from the victim, to an FBI laboratory. Agent Peele analyzed the various samples and documented his findings in an expert report. Pet. App. 10a-15a.

Respondent was charged in Maryland state court with first-degree murder and a related firearms offense. Respondent was initially convicted, but the conviction was vacated because the trial court denied respondent an opportunity to respond to the State's rebuttal evidence. See 649 A.2d 1173, 1179 (Md. Ct. Spec. App. 1994).

The State proceeded to retry respondent. Before the retrial, defense counsel possessed a copy of Agent Peele's expert report. Pet. App. 15a. But they did not research Agent Peele's prior publications and thus did not locate the Peele Report. *Id.* at 28a-29a. Indeed, defense counsel later testified that, although they had been informed of the prosecution's intention to present Agent Peele's testimony, they did not recall conducting *any* investigation into the validity of CBLA evidence. *Id.* at 10a n.8. Specifically, they did not recall reviewing any literature on, or speaking to anyone about, CBLA, nor

did they recall considering retaining an expert on the subject. *Ibid.*

At the retrial, because the prosecution had no direct evidence linking respondent to the crime, it heavily relied on Agent Peele's analysis. In his testimony, Agent Peele first compared the bullet fragment recovered from the victim to one of the fragments found in respondent's truck. Pet. App. 11a. He explained that the two fragments were "analytically indistinguishable" because they contained "the same amounts of each and every element that we detected." *Ibid.* He then opined that the result was "what you'd expect if you were examining two pieces of the same bullet, * * * two pieces of the same source." *Ibid.*

Agent Peele next compared one of the bullets recovered from respondent's handgun to the fragment recovered from the victim. Pet. App. 12a. He testified that, although the two samples were not a perfect match, they were "extremely close" in composition. *Ibid.* He then opined that the result was "not what you'd expect, unless there's some association between the two groups * * * such as being made by the same manufacturer on or about the same time." *Id.* at 12a-13a.

Agent Peele concluded by testifying that the three bullet samples in question—the fragment from the victim, the fragment from the truck, and the bullet from respondent's handgun—were so close in composition that "all these bullets at one time could have been in the same box" of ammunition. Pet. App. 14a.

Although defense counsel cross-examined Agent Peele about the degree of similarity among the various samples, counsel did not question him about the assumption that each source of lead is chemically unique. Nor did counsel confront Agent Peele with the findings from the 1991 Peele Report casting serious doubt on that as-

sumption, since counsel was obviously unaware of the report. Pet. App. 15a, 17a-18a.[2]

During closing arguments, the prosecution seized on Agent Peele's analysis to link respondent to the crime. The prosecution explained to the jury: "Because we don't have any witnesses who actually saw [respondent] put the gun to Gina's head, we fill in the gaps. And the way we fill in the gaps is with forensic evidence." Pet. App. 32a. Citing Agent Peele's analysis, the prosecution argued that the bullet fragments recovered from the victim and from respondent's truck "are the same," and "[y]ou can't tell one from the other." *Id.* at 16a. The prosecution similarly argued that the bullet found in respondent's handgun was "very nearly identical" to the fragment recovered from the victim. *Id.* at 17a. The prosecution then asked the jury: "Now think about this. Out of all the billions of bullets in the world, is this just a coincidence that that bullet ends up in [respondent's] off-duty weapon. Is, is that just a coincidence? I don't think so." *Ibid.*

In response, defense counsel did not seriously challenge CBLA's reliability. Instead, as during the cross-examination of Agent Peele, counsel questioned the degree of similarity among the various samples: "[W]hen Agent Peele was testifying and we looked at his notes, you'll see the different calculations. And, no, none of [them] match up too closely. I'm not an expert on bullets but, as you'll see, there's all different sorts of numbers on there. All different sorts of numbers." Pet. App. 17a.

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[2] By contrast, in a trial that occurred several months before respondent's, defense counsel presented testimony from an expert who challenged the assumption that, if two bullets are "analytically indistinguishable," they must have come from the "same pour of lead." *United States* v. *Davis*, 406 F.3d 505, 509 (8th Cir. 2005).

The jury found respondent guilty of first-degree murder and the related firearms offense. Pet. App. 117a. The trial court sentenced respondent to life imprisonment without parole. *Ibid.* On direct review, the Maryland Court of Special Appeals affirmed, No. 385, 1996 Term (Dec. 20, 1996) (per curiam), and the Maryland Court of Appeals denied a petition for certiorari, 691 A.2d 1312 (1997).

4. In 1997, respondent filed a petition for post-conviction relief in state court. Pet. App. 117a. After several amendments, respondent filed a final version of the petition in 2006. *Ibid.* As is relevant here, respondent claimed that defense counsel was ineffective for failing to challenge the prosecution's CBLA evidence based on information that was "in existence at the time" of trial. *Id.* at 5a n.5. In the alternative, respondent claimed that CBLA had proven to be so unreliable that the admission of CBLA evidence violated due process. *Id.* at 5a.

The trial court denied the petition. Pet. App. 115a-167a. The trial court rejected respondent's ineffective-assistance claim on the ground that "questions concerning the reliability of [CBLA] didn't even surface until long after [respondent's] trial." *Id.* at 154a. The trial court also rejected respondent's due-process claim, reasoning that the unreliability of CBLA was "not a basis for post-conviction relief." *Id.* at 151a.

5. On appeal, respondent renewed his due-process claim, but did not renew his ineffective-assistance claim concerning CBLA evidence. The Maryland Court of Special Appeals affirmed. Pet. App. 59a-114a.

6. The Maryland Court of Appeals reversed and remanded for a new trial. Pet. App. 1a-57a.

a. Although respondent did not renew his ineffective-assistance claim concerning CBLA evidence on ap-

peal, the Maryland Court of Appeals raised questions about that claim during oral argument. Pet. App. 9a. The court did so "after the State argued that the admission of CBLA evidence was not a due process violation because [respondent's] attorneys should have been able to test the flawed assumptions upon which CBLA was based" as of the time of trial. *Ibid.* In light of the State's factual assertion, the court exercised its discretion to reach respondent's ineffective-assistance claim under Maryland Rule 8-131, which provides that a Maryland appellate court may decide an issue that "plainly appears by the record to have been raised in or decided by the trial court." Pet. App. 9a n.7.

The Maryland Court of Appeals proceeded to analyze the claim under the familiar two-part standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 18a. As to the first prong—deficient performance—the court expressly recognized that it was required to assess the reasonableness of counsel's performance as of "the time of counsel's conduct." *Ibid.* (quoting *Strickland*, 466 U.S. at 690). The court explained that, in cases involving forensic evidence, counsel is obligated "properly [to] investigate" the prosecution's forensic methodology and "adequately [to] cross-examine" the prosecution's forensic expert. *Id.* at 19a.

Applying those principles, the court determined that defense counsel should have investigated Agent Peele's prior publications and cross-examined him about the Peele Report. Pet. App. 21a-29a. The court noted that, in the report, Agent Peele and his colleagues had "clearly indicated that two bullets produced fifteen months apart had the same composition" and thereby "called into question the assumption that no two sources of lead would ever produce bullets with the same chemical composition." *Id.* at 25a. The court added that the report

was published on June 24, 1991, and distributed to public libraries in 1994. *Id.* at 25a & n.12. As a result, the report "was available to [respondent's] attorney[s] in 1995." *Id.* at 25a.

The court next explained that, if defense counsel had reviewed the report, they would have had a "potent" basis for challenging Agent Peele's testimony. Pet. App. 27a. Specifically, counsel could have challenged Agent Peele's conclusion that the fragments recovered from the victim and from respondent's truck came from the "same source" and that the bullet recovered from respondent's handgun had "some association" with the fragment from the victim. *Ibid.* Defense counsel, the court continued, "would have been able to posit the likelihood that the chemical composition of the bullet found in the victim could have matched other bullets, not analyzed by the FBI." *Id.* at 27a-28a.

With regard to the first prong of *Strickland*, the court concluded that counsel's failure to investigate Agent Peele's prior publications and cross-examine him about the Peele Report "fell short of prevailing professional norms." Pet. App. 28a. Given the serious nature of the charges against respondent and the centrality of the CBLA evidence to the prosecution's case, the court reasoned, "it was incumbent on [respondent's] attorneys to subject the [S]tate's theories to the rigors of adversarial testing." *Ibid.* (citation omitted).

As to the second prong of *Strickland*—prejudice—the court assessed whether there was a "substantial possibility" that, but for counsel's errors, the outcome of respondent's trial would have been different. Pet. App. 31a. The court noted that, as a general matter, jurors "tend to give considerable weight" to forensic evidence. *Id.* at 32a (citation omitted). The court added that "[t]he importance of the CBLA evidence to the instant matter

* * * cannot be overstated." *Ibid.* The court observed that the prosecution "rigorous[ly]" relied on Agent Peele's testimony, both in its case in chief and in its closing argument, to "connect [respondent] to the crime." *Id.* at 33a. If counsel had cross-examined Agent Peele about "the possibility of having compositionally similar bullets * * * in different batches," the court concluded, "there was a 'substantial possibility' that the outcome would have been different." *Ibid.*

In light of its determination that both prongs of *Strickland* were satisfied, the court remanded for a new trial. Pet. App. 33a.

b. Judge McDonald, joined by two other judges, dissented. Pet. App. 35a-57a. At the outset, he acknowledged that the case was "troubling" because respondent was convicted based in part on unreliable CBLA evidence. *Id.* at 36a. But he disagreed with the majority's application of *Strickland* to the facts of this case. *Id.* at 37a-38a. As to deficient performance, Judge McDonald contended, *inter alia*, that it was "not entirely clear" whether the 1991 Peele Report was "readily available outside the FBI at the time of the 1995 trial." *Id.* at 43a. He also questioned whether defense counsel could have used the findings from the Peele Report to discredit Agent Peele's testimony. *Id.* at 44a-46a. As to prejudice, Judge McDonald did not dispute that CBLA evidence was central to the prosecution's case, but he noted that there was other circumstantial evidence linking respondent to the crime. *Id.* at 50a-55a. "If [respondent's] trial counsel were ineffective," Judge McDonald concluded, "it was not with respect to their challenge of the CBLA evidence." *Id.* at 55a.

ARGUMENT

The decision of the Maryland Court of Appeals is correct and does not conflict with any decision of this Court, a federal court of appeals, or another state court of last resort. The State's primary contention (Pet. 17-24) rests entirely on an erroneous premise, because the Maryland Court of Appeals did not assess counsel's performance based on information that was unavailable at the time of trial. Rather, it faithfully applied the settled principle from *Strickland* v. *Washington*, 466 U.S. 668 (1984), that performance must be assessed as of "the time of counsel's conduct." Pet. App. 18a (citation omitted). Specifically, the court determined that defense counsel should have investigated Agent Peele's prior publications and cross-examined him about the Peele Report. *Id.* at 21a-29a. Although the State quibbles over whether counsel could have located the report at the time of trial, that fact-bound contention is meritless and does not warrant this Court's review. Because this case presents no question of law on which the lower courts are divided, and because the court below correctly applied settled principles of law, the petition for a writ of certiorari should be denied.

A. This Case Does Not Present Any Important Question Of Federal Law, Because The Lower Court Correctly Assessed Counsel's Performance Based On Information That Was Available At The Time Of Trial

1. There is simply no merit to the State's primary argument that the Maryland Court of Appeals assessed counsel's performance based on information that was "unavailable" at the time of trial. Pet. 17. Quoting *Strickland*, the court correctly recognized that the reasonableness of counsel's performance must be assessed as of "the time of counsel's conduct." Pet. App. 18a

(quoting 466 U.S. at 690). Later in its opinion, moreover, the court reiterated "the principle that counsel's performance must be assessed at the time of [respondent's] trial." *Id.* at 21a.

Applying that well-established principle, the Maryland Court of Appeals determined that defense counsel should have investigated Agent Peele's prior publications and cross-examined him about the Peele Report, which he cowrote in 1991. Pet. App. 21a-29a. As the court explained, that report "called into question [CBLA's] assumption that no two sources of lead would ever produce bullets with the same chemical composition" by concluding that "two bullets produced fifteen months apart had the same composition." *Id.* at 25a. The court specifically found, moreover, that the report "was available to [respondent's] attorney[s] in 1995." *Ibid.* Contrary to the State's contention, therefore, the court assessed counsel's performance based not on "subsequent scientific advances," Pet. 22, but rather on contemporaneous information that cast serious doubt on the validity of Agent Peele's testimony.

2. For that reason, the State's petition presents no significant legal question that warrants this Court's review. When stripped of its mischaracterization of the opinion below, the State's petition merely asserts that the Maryland Court of Appeals misapplied the *Strickland* standard to the particular facts of this case. And in that regard, the State's disagreement with the court's application of *Strickland* is remarkably narrow. The State does not dispute that a reasonably diligent attorney would have investigated Agent Peele's prior publications or that the findings from the Peele Report called into question the reliability of CBLA. Nor does the State affirmatively argue that the lower court misapplied the second prong of *Strickland* when it determined that

counsel's failure to confront Agent Peele with the report's findings was prejudicial. Instead, the State simply challenges the factual proposition that counsel could have located the 1991 Peele Report at the time of trial in 1995. Pet. 17, 22-23.

Even as to that specific proposition, however, the State provides no valid reason to doubt the Maryland Court of Appeals' determination. Although the State asserts that counsel could not have located the report through an "internet search," Pet. 17, the State does not dispute that the report was published on June 24, 1991, and distributed to public libraries in 1994. See Pet. App. 25a & n.12. As a result, even putting aside the fact that the Internet was still in its infancy, counsel could have obtained a hard copy of the report before the 1995 trial. And even if the court below had erred in some respect, the State's contention on such an exceedingly narrow factual issue would hardly warrant this Court's review.

Beyond that contention, the State faults the Maryland Court of Appeals for "dec[iding] to raise, *sua sponte*," the ineffective-assistance claim concerning CBLA evidence. Pet. 17. Contrary to the State's suggestion, however, the court did not "generat[e]" that claim on its own. Pet. 19. Instead, respondent plainly raised that claim in his petition for post-conviction relief, and the trial court squarely addressed it. See Pet. App. 5a n.5, 154a-155a. In deciding to reach the issue despite respondent's failure to renew his claim on appeal, the Maryland Court of Appeals was merely exercising its discretion under Maryland Rule 8-131, which provides Maryland appellate courts with broad authority to reach issues not raised on appeal. See Pet. App. 9a n.7. The court did so, moreover, because the State itself asserted during oral argument that there was no due-process violation because respondent's trial counsel could have chal-

lenged the assumptions underlying CBLA *based on information that was available at the time of trial. Id.* at 9a. To the extent that the State disagrees with the Maryland Court of Appeals' application of a state procedural rule (or merely regrets the position it took at oral argument below), that court's decision to reach the merits of respondent's ineffective-assistance claim self-evidently does not warrant this Court's review.

3. Because the Maryland Court of Appeals correctly articulated and applied the principles of federal law governing respondent's ineffective-assistance claim, this case does not present the Court with "the opportunity to clarify the *Strickland* standards in the constantly[] evolving area of scientific evidence," as the State ambitiously contends. Pet. 17. It is undisputed that, under *Strickland*, the reasonableness of counsel's performance is assessed as of "the time of counsel's conduct," without regard to later developments. 466 U.S. at 690. Nor is the State correct when it asserts that the Court has "not had occasion" to address that principle since *Strickland*. Pet. 22a. In fact, this Court has reiterated that principle in several subsequent cases involving ineffective-assistance claims. See, *e.g.*, *Rompilla* v. *Beard*, 545 U.S. 374, 381 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 523 (2003).

The State similarly misses the mark when it contends that "review is supported by the fact that reassessment of constitutional principles and provisions becomes necessary in light of technological advancement or change in law." Pet. 20. Whatever the merits of that contention as an abstract matter, the State is not asking the Court to "reassess" any constitutional principle; instead, it is merely asserting that the lower court misapplied settled principles to the facts of this particular case. That is the paradigmatic situation in which further review is not warranted.

B. The Decision Below Does Not Conflict With Any Decision Of A Federal Court Of Appeals Or Another State Court Of Last Resort

Finally, the State contends that this Court should grant review to resolve a conflict between the decision below and various decisions that have rejected ineffective-assistance claims based on "the failure to discover flaws in CBLA evidence at trial in the 1990s." Pet. 24-26. As a preliminary matter, this Court does not sit to correct "conflicts" in which lower courts, applying the same legal standards, reach different results on similar facts; it sits to correct conflicts in the *legal standards* applied by the lower courts.

But in any event, the cases the State cites involve different facts—and are distinguishable on that basis. Most of the cases involved trials that occurred before the publication of the Peele Report in 1991 or its distribution to public libraries in 1994. See *Smith* v. *Department of Corrections*, 572 F.3d 1327, 1350 (11th Cir. 2009) (1990 trial); *Libby* v. *McDaniel*, Civ. No. 04-38, 2011 WL 1301537, at *8-*9 (D. Nev. Mar. 31, 2011), aff'd, 580 Fed. Appx. 560 (9th Cir. 2014) (1990 trial); *Wyatt* v. *State*, 71 So. 3d 86, 93 (Fla. 2011) (January 1991 trial); *Wyatt* v. *State*, 78 So. 3d 512, 527 (Fla. 2011) (November 1991 trial). In two other cases, defense counsel actually did challenge the assumption that each source of lead is chemically unique. See *United States* v. *Higgs*, 663 F.3d 726, 739 (4th Cir. 2011); *United States* v. *Davis*, 406 F.3d 505, 508-510 (8th Cir. 2005). And in the remaining case, an intermediate state court appears to have been unaware of the Peele Report and thus did not address whether counsel should have used it. See *Robertson* v. *State*, No. M2007-1378, 2009 WL 277073, at *17 (Tenn. Ct. Crim. App. Feb. 5, 2009).

The State does not identify any disagreement among those courts as to the appropriate legal standard—nor could it, because those courts, like the Maryland Court of Appeals in this case, simply applied the settled principles adopted by this Court in *Strickland* and its progeny. And to the extent those courts reached different results in applying those principles, it merely reflects the intensely factbound nature of the ineffective-assistance inquiry, not any conflict that requires this Court's review. Because the State has failed to identify any question of law on which the lower courts are divided, and because the lower court correctly applied settled principles of law in granting respondent relief, further review is not merited.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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